

# What Being Left Behind by the Rule of Law Feels Like, Part I

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Renáta Uitz

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On October 25, 2018 Central European University (CEU) made international news again. President and Rector Michael Ignatieff announced that CEU is moving to Vienna, unless the Hungarian government makes progress by December 1, 2018 on the international agreement it is meant to sign with the State of New York under Hungarian law.

In the last few hours many readers of this blog, friends and colleagues, took to asking how I felt about this.

Disappointed, frustrated – but most of all: betrayed.

This is what being left behind by the rule of law feels like: left at the disposal of the operators of naked legality, without the poetry of “essentially contested concepts” wrapped in that comforting “thick or thin” padding.

It was almost a year ago, on October 13, 2017, that the Hungarian Minister of Justice announced: the government decided to extend by a year the deadline it imposed earlier that year on foreign private universities to meet new conditions for their continued operation in Hungary. One of these conditions is an international agreement signed between the Hungarian government and the foreign state that accredited said foreign private university. Note that this is not a condition a foreign private university can comply with on its own. It is a deadline set by the sovereign for itself. If the sovereign were to fail to meet this self-imposed deadline, its subject – the university – is meant to take the fall.

Last year's extension came as a surprise. Two days earlier, on October 11, 2017 the deadline set in Hungarian law for the Hungarian government to sign such an agreement expired without the government doing so. That deadline was set by an amendment of the higher education law that was tabled on March 28, 2017 and was passed by the Hungarian Parliament in a procedure of exceptional urgency on April 4, 2017 amidst intense international and domestic protest. President Áder signed the bill into law on April 9, 2017.

When the Minister of Justice announced the extension as a fine touch, he emphasized: “despite mounting international pressure which lacks any substantive legal argument the Hungarian government insists that Hungarian law applies to all, including Central European University.”

This is where the story becomes interesting.

To date almost all European constitutional actors (with the exception of the CJEU and the ECtHR) had expressed an interest in the matter. Yet, in the last year a half

not a single one of them has said or done anything of actual consequence for CEU – or for the rule of law.

The European Commission was quick to react to events on the ground: on April 12 First Vice-President Frans Timmermans told the College that [“\[t\]he recently adopted Higher Education Law is troubling many people in Europe’s academic community, as well as politicians across Europe and beyond. It is perceived by many as an attempt to close down the Central European University. ... Universities must be places where free thinking and diversity of opinions are cherished and nourished. ... I agree ... on the importance of the Central European University being able to operate in Budapest undisturbed.”](#) On April 26, 2017 the Commission [announced](#) that it was to commence infringement action against Hungary on account of the amendment of the higher education law.

The first formal legal challenge against the law was brought by a group of MPs before the Hungarian Constitutional Court on April 21, 2017 (Case no. II/01036/2017.) The MPs claimed that the exceptional urgency procedure followed to adopt the law was unwarranted and thus violated the rule of law (Article B(1), Fundamental Law). They also argued that the amendment entered into force too rapidly, not leaving sufficient time for its subjects to meet its conditions, thus violating the rule of law (Article B(1), Fundamental Law). The case mobilized several *amici curiae* from Hungarian and international academia, including – rather unusually – the former president of the Constitutional Court and president of the republic, László Sólyom. They argued that if the Court were to follow its long-standing jurisprudence, it would need to find the amendment unconstitutional as a blatant violation of the rule of law. Sensing the pressure, the Constitutional Court decided to form a special task force to study the case. And announced in the press that it has done so, before going on its summer break.

Next in line was the Parliamentary Assembly of the Council of Europe, passing a resolution on 27 April 2017, echoing the concerns of the European Commission in the following terms:

10. .... The European Commission decided, on 26 April 2017, to take legal action on the Act amending the Hungarian National Higher Education Act, based on its conclusion that “the law is not compatible with the fundamental internal market freedoms, notably the freedom to provide services and the freedom of establishment but also with the right of academic freedom, the right to education and the freedom to conduct a business, as provided by the Charter of Fundamental Rights of the European Union”.

On May 17, 2017 the European Parliament called on the Hungarian Government

“to immediately suspend all deadlines in the act amending the National Higher Education Act, to start immediate dialogue with the relevant US authorities in order to guarantee the future operations of the Central European University issuing US-accredited degrees, and to make a public commitment that the university can remain in Budapest as a free institution” (2017/2656(RSP)).

The Venice Commission made sure to publish a [detailed preliminary opinion](#) on August 11, 2017. Before getting to the merits, the Opinion dutifully lists all the European measures taken thus far to warn the Hungarian government that the amendment is highly problematic. When setting the scene the Venice Commission started with explaining that:

22. The Law is worded in a neutral way and does not refer to any particular higher education institution. Established institutions as well as potential new foreign universities aiming at operating in Hungary are equally affected by the new rules. However, as previously mentioned, the Law has been widely criticized by domestic and international commentators as being directed specifically at the Central European University.

The final opinion of the Venice Commission was published on October 9, 2017 emphasizing that

[123. ... introducing more stringent rules without very strong reasons, coupled with strict deadlines and severe legal consequences, to foreign universities which are already established in Hungary and have been lawfully operating there for many years, appears highly problematic from the standpoint of rule of law and fundamental rights principles and guarantees. These universities and their students are protected by domestic and international rules on academic freedom, the freedom of expression and assembly and the right to and freedom of education."](#)

This was less than a week before the Hungarian government decided to extend the deadlines to enable compliance with the new conditions for operation set in the spring of 2017.

In the meantime the Hungarian government was also in conversation with the European Commission, as per the terms of the ongoing infringement procedure. Unhappy with the adjustments the Hungarian government made to the law during their dialogue, the European Commission [decided to hand the infringement action over to the Court of Justice on December 7, 2017](#), the amendment

["violates the freedom to provide services \(Article 56 TFEU\); the freedom of establishment \(Article 49 TFEU\); Directive 2006/123/EC on services in the internal market \(Article 16\); the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union \(Articles 13, 14, 16 respectively\); as well as the Union's legal obligations under international trade law \(the General Agreement on Trade in Services – GATS – in the framework of the World Trade Organisation, WTO\)."](#)

Hearing about the pending infringement case before the CJEU on April 21, 2018 the Hungarian Constitutional Court acted as a model European citizen and decided to suspend the case before it until the judgment of the CJEU, in order to ensure the primacy of EU law, to the extent possible (II/1036/2017. AB resolution).

Since the spring of 2018 the European Parliament spent considerable time on discussing the state of the rule of law in Hungary. The resolution devotes three full paragraphs to detailing the above events (P8\_TA(2017)0216, paragraphs 33-35). Reading these words one is left with with the distinct impression that this vignette must have contributed to the European Parliament's decision of September 12, 2018 to trigger the EU's 'nuclear option' to safeguard the rule of law (Article 7(1) TEU) due to "a clear risk of a serious breach by Hungary of the values on which the Union is founded."

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